

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

INVESTIGATION BY THE DEPARTMENT OF )  
TELECOMMUNICATIONS AND ENERGY ON ITS )  
OWN MOTION INTO FITCHBURG GAS AND ) D.T.E. 03-9  
ELECTRIC LIGHT COMPANY'S DEALINGS WITH )  
ENERMETRIX, INC. )

REPLY BRIEF OF  
FITCHBURG GAS AND ELECTRIC LIGHT COMPANY

July 3, 2003

LeBoeuf, Lamb, Greene & MacRae, L.L.P.  
260 Franklin Street  
Boston, MA 02110  
(617) 439-9500

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A.    Unitil Did Not Exert Substantial Control over Enermetrix. ....	1
1.    Unitil's Single Seat on the Enermetrix Board in 2001 and 2002 Did Not Confer Substantial Control over Enermetrix. ....	1
2.    Mr. Daly's Departure from Unitil and Employment By Enermetrix Did Not Increase Unitil's Influence On the Enermetrix Board. ....	3
3.    Usource's Transactions with Enermetrix Are Not Evidence of an Absence of Bargaining Power between FG&E and Enermetrix .....	5
B.    FG&E Did Not Violate Massachusetts Affiliate Statutes and Regulations .....	6
C.    The Benefits to FG&E's Customers from the Enermetrix Transactions Should Be Considered .....	8
III. CONCLUSION .....	10

## I. INTRODUCTION

On June 26, 2003, Fitchburg Gas and Electric Light Company ("FG&E") and the Office of the Attorney General (the "Attorney General") simultaneously submitted their initial briefs in this proceeding to the Department of Telecommunications and Energy (the "Department").

FG&E's reply brief offers necessary clarifications and corrections to assertions made by the Attorney General. FG&E also responds to new arguments raised by the Attorney General on brief. As FG&E stated in its initial brief, the statutory analysis and evidence demonstrate that Enermetrix was not an affiliate of FG&E during the 2001 and 2002 default service solicitations, and that FG&E was in compliance with the applicable statutes and regulations. FG&E Br. at 1. The evidence also shows that FG&E's customers received significant benefits from FG&E's transactions with Enermetrix. Although the Attorney General dismisses as irrelevant the positive results for FG&E's customers, FG&E requests that in reaching its decision in this investigation, the Department take into account that FG&E's customers realized savings of approximately \$900,000 due to the 2001 and 2002 solicitations, an average of \$65.00 for each residential customer for the twelve month period.

## II. ARGUMENT

### A. Unitil Did Not Exert Substantial Control over Enermetrix.

The Attorney General's conclusion that Enermetrix was an affiliate of FG&E under G.L. c. 164, § 85 and 220 C.M.R. 12.02 is erroneous, and is based upon incorrect assertions, or facts that are not relevant to the Department's investigation.

#### 1. Unitil's Single Seat on the Enermetrix Board in 2001 and 2002 Did Not Confer Substantial Control over Enermetrix.

The Attorney General's claim that Unitil exercised substantial control over Enermetrix is contrary to the record evidence regarding Unitil's relationship with Enermetrix

during the relevant time period (i.e. from August 2001 until April 2002). Without citation to facts in the record, the Attorney General claims that despite Unitil's "minority shareholder stake in Enermetrix (-10%)", Unitil was able to "wield substantial influence and decision making power" on the Board. AG Br. at 2, n.2. The Attorney General's claims are based upon a mischaracterization of the record which fails to recognize Unitil's diminished role on the Enermetrix Board after 1999.

As support for his argument that Unitil had substantial control over Enermetrix, the Attorney General offers an inconclusive statement that over a 3 year period, from 1999 to 2002 Unitil held "1 or 2 seats" out of a total of "6 or 10 seats" on the Enermetrix Board. AG Br. at 2-3. The evidence is undisputed that when FG&E used Enermetrix to broker its 2001 and 2002 default service solicitations Unitil held only one board seat out of 10. Exh. FGE-1 at 6. As Mr. Brock testified, Unitil's minority investment and its single board seat gave Unitil no power or authority to control, substantially or otherwise, the board or to influence, policies or decision-making at Enermetrix. See Tr. 6/11/03 at 22-23 (Brock). This is the only evidence before the Department on the issue of 'control'. The fact that "as of January 29, 1999, Unitil held 2 of 6 seats on the Board . . ." is completely immaterial, because the first transaction between FG&E and Enermetrix did not occur until approximately August of 2001, two years after Unitil's representation on the Enermetrix Board had been reduced to one seat. See AG Br. at 3.

The Attorney General's apparent confusion regarding the total number of Enermetrix board seats depending upon Mr. Gaus' (an Enermetrix Officer) position at any given time, is also a red herring. See AG Br. at 3, n.3. By the time of FG&E's default service solicitations in 2001 and 2002, Unitil's Chairman was one of a total of 10 directors on the Board,

and Mr. Gaus' role as director or as CEO of Enermetrix was irrelevant. See Tr. 6/11/03 at 66-68 (Brock). Because the record evidence does not support the conclusion that Unitil had substantial control over Enermetrix by virtue of its single seat on the Board of Directors during the relevant period, the Department should find that Enermetrix was not an affiliate of FG&E under §85(b).<sup>1</sup>

The Attorney General's reliance upon the Department's decision in Bay State Gas Company, D.P.U. 92-68, is misplaced. AG Br. at 2, n. 2. In that case, the Department found that Bay State's 17.5 % interest in MassPower may create "the appearance of an absence of equal bargaining power" sufficient to satisfy the definition of an affiliate in G.L. c. 164, §85(c). Id. (emphasis added). As FG&E noted in its initial brief, if a 17.5 percent interest only suggests an "appearance" of an absence of equal bargaining power, Unitil's interest of 8.68 percent, at least half of the size of Bay State's interest in MassPower, would not satisfy the definition of an affiliate under §85(b). See FG&E Br. at 12. Moreover, the record evidence does not support a conclusion or inference that there was a lack of equal bargaining power between FG&E and Enermetrix pursuant to §85(c).

2. Mr. Daly's Departure from Unitil and Employment By Enermetrix Did Not Increase Unitil's Influence On the Enermetrix Board.

The Attorney General's assertion that Unitil exercised substantial control over Enermetrix "through management personnel" is also contrary to the record evidence. AG Br. at 3. The facts that James Daly held a seat on the Enermetrix Board for a brief period during his employment with Unitil, and that later Mr. Daly was employed by Enermetrix are irrelevant to whether Enermetrix was an affiliate of FG&E. To the contrary, Unitil's loss of the Board seat

---

<sup>1</sup> Similarly, the Attorney General's assertion that the use of the words "associate company" and "affiliate agreements" in several documents infers that Enermetrix is an affiliate of FG&E under G.L. c. 164, §85, is erroneous. AG Br. at 5. The cited references are in the context of an entirely different statutory or contractual construct, and in a period prior to 2001, before Unitil's interest in Enermetrix decreased. The cited terms do not support a conclusion or inference that FG&E was an affiliate of Enermetrix in 2001 and 2002 within the meaning of G.L. c. 164, §85.

held by Mr. Daly and Mr. Daly's departure from Unitil demonstrate a decrease in Unitil's potential to influence Enermetrix. The Attorney General has failed to establish a link between Mr. Daly's positions at Unitil and Enermetrix and the focus of the Department's investigation, i.e., whether Enermetrix was an affiliate of FG&E from August 2001 and April 2002 by virtue of Unitil's minority ownership interest in Enermetrix.

Mr. Daly served on the Enermetrix board from 1999 until 2000, when he left Unitil. Exh FGE-1 at 6; Tr 6/11/03 at 41-42 (Brock). Even if the Attorney General were correct that "Mr. Daly's presence on the Enermetrix Board of Directors benefited Unitil and provided Unitil access, influence and control in the policies and decisions and control of Enermetrix", it is completely irrelevant because Mr. Daly left Unitil in 2000, many months prior to the first default service solicitation that Enermetrix conducted on behalf of FG&E. See AG Br. at 3. Therefore, any influence Mr. Daly could have exerted on Enermetrix by virtue of his position as "management personnel" of Unitil ended in 2000 when he left Unitil and resigned his seat on the Enermetrix Board. See Tr. 6/11/03 at 42 (Brock).

The Attorney General's allegation that Unitil derived a benefit from "having Mr. Daly serve as Vice President of Enermetrix" is not supported by any record evidence. See AG Br. at 3, n. 4. Unitil did not "have Mr. Daly serve" at Enermetrix in any capacity. There is no evidence that Mr. Daly left Unitil to work at Enermetrix at Unitil's behest. There is also no evidence that Mr. Daly used his prior association with Unitil to benefit Unitil in any manner during his employment at Enermetrix. Nor did Mr. Daly return to Unitil when he left Enermetrix. Moreover, it was not necessary for Mr. Daly to execute a covenant not to compete with FG&E, because Enermetrix could not be a competitor of FG&E, since FG&E was not and could not be in the power supply business. See AG Br. at 3, n. 4.

3. Usource's Transactions with Enermetrix Are Not Evidence of an Absence of Bargaining Power between FG&E and Enermetrix

The Attorney General's digression into Usource's transactions with Enermetrix is based upon an erroneous interpretation of G.L. c. 164, §85(c) and is therefore inapplicable to the question of Enermetrix' status as an affiliate of FG&E. AG Br. at 3-4. Even if the Attorney General were correct, and there was an absence of bargaining power between Usource and Enermetrix, the fact is irrelevant because §85(c) does not apply to Usource. Section 85(c) provides that an affiliate includes an entity:

Standing in such a relation to a company subject to this chapter that there is an absence of equal bargaining power between the [entity] and the company so subject, in respect to their dealings and transactions.

Id. (emphasis added). The question before the Department is whether Enermetrix was an affiliate of FG&E, which is a company "subject to this chapter". Usource's "dealings and transactions" with Enermetrix are irrelevant to a determination of whether Enermetrix was an affiliate of FG&E. For example, Usource was not required under Massachusetts law to provide a "reasonable explanation" for the transactions between Usource and Enermetrix that occurred in the normal course of business and were typical transactions for a start up company like Usource. See Tr. 6/11/03 at 80-82 (Brock).

Furthermore, contrary to the Attorney General's claim, FG&E did not negotiate and enter into an agreement with Enermetrix "without knowing what fee Enermetrix would charge". AG Br. at 4. Mr. Foote testified that he had discussed Enermetrix' fee in the introductory telephone call and before the first solicitation, and that he understood that the fee was within a reasonable range, i.e., "below the level that usually makes a difference in wholesale transactions". Tr. 6/11/03 at 116 (Foote). As explained in FG&E's initial brief, the total supplier

fee of \$19,000 for \$3.8 million of power supplies is evidence that FG&E and Enermetrix dealt at arms length in the default service solicitations. FG&E Br. at 13-14.

The Attorney General has not provided any evidence that Enermetrix and FG&E were on unequal bargaining terms, nor established the relevance of the allegations of unfairness in the dealings between Usource and Enermetrix. Accordingly, based upon evidence presented by FG&E, the Department should find that Enermetrix does not meet the definition of an "affiliate" under §85(c).

B. FG&E Did Not Violate Massachusetts Affiliate Statutes and Regulations

As explained in FG&E's initial brief, no violation of G.L. 164, §§76A, 85A or 94B occurred because Enermetrix was not an affiliate of FG&E. See FGE Br. at 14-15. Moreover, even if Enermetrix could be deemed to be FG&E's affiliate, any violation of §85A, which would have required FG&E to file with the Department a statement describing the terms of the Enermetrix arrangement, was de minimis. FG&E did not submit such a statement based upon its reasonable determination that Enermetrix was not its affiliate under §85. The Company repeatedly disclosed its interest in Enermetrix in its financial reports and other documents. See FG&E Br. at 15. Indeed, prior to FG&E's 2001 default solicitation, the Attorney General himself noted Unitil's interest in Enermetrix in submissions to the Department. Exh. AG-1-2, Att. at 3 of 4.

As further explained in FG&E's initial brief, §94B, which requires contracts with affiliates for a period in excess of one year to be filed with the Department, is not relevant to this investigation because both default service solicitations were for periods shorter than one year. See FG&E Br. at 14. The Department should dismiss the Attorney General's attempt, at footnote 10 of his brief, to cast FG&E's two separate transactions as a single agreement in order to

establish a violation of the statute. AG Br. at 5, n. 10. The evidence shows that the 2001 and the 2002 solicitations were two separate and distinct arrangements between FG&E and Enermetrix, not a single unbroken transaction that was in excess of one year. See Exh. FGE-3 at 5, 7. There is no evidence that when Mr. Foote first contacted Enermetrix in the summer of 2001, Enermetrix was engaged to conduct both the September 2001 and the April 2002 solicitations. In March 2002, Mr. Foote renewed the arrangement with Enermetrix, and FG&E entered into a separate arrangement with Enermetrix to solicit default service supplies for the summer of 2002. See id. at 7. Moreover, even if the two solicitations constituted a single transaction, the 'transaction' commenced in August 2001 and ended in April 2002, a period of less than one year. Enermetrix' involvement was limited to the two solicitations. Following the solicitations, and the selection of the successful bidder, Enermetrix did not continue to play a role in negotiating the final contract. Accordingly, no violation of c. 165, §94B occurred.

Furthermore, because §94B is not applicable, §94C, which provides that in a transaction with an affiliated entity the electric company has the burden of establishing the reasonableness of any charge to the affiliate, is also inapplicable. Moreover, even if FG&E were subject to the provisions of §§94B and 94C, as explained in FG&E's initial brief, FG&E met its burden and established the reasonableness of the brokering fees that Enermetrix charged the winning bidders. See FG&E Br. at 16-17. Enermetrix charged the suppliers according to its standard brokering fees that it charged other suppliers using the Enermetrix Exchange. See DTE-RR-2. It would be unreasonable to suggest that total transaction fees of \$19,000 for \$3.8 million of supplies are not market-based. As Schedule DKF-1 attached to Mr. Foote's testimony demonstrates, the Enermetrix solicitations resulted in FG&E having the lowest average Default

Service rates of the Massachusetts distribution companies during that time, confirming the competitive market results. Exh. FGE-3, Sch. DKF-1.

Finally, the Attorney General's assertion that FG&E gave Enermetrix preference over other non-affiliated suppliers is erroneous and not supported by the record evidence. AG Br. at 5; see also id. at 4, n. 7. As support for this allegation, the Attorney General cites the misstatement in Usource's software license agreement with NAP (the predecessor of Enermetrix) that Usource had an obligation "to ensure at least 10 active electric and 10 active gas suppliers bidding on loads". Exh. DTE-1-7(1). The Attorney General contends that to satisfy this alleged obligation, FG&E gave preference to Enermetrix for the 2001 and 2002 supply solicitations. AG Br. at 5-6. In fact, as FG&E explained in a follow-up discovery response, Usource had no such obligation, and the reference to Usource in Attachment DTE 1-7(1) is a typographical error. The intent of the provision in the license agreement between Usource and NAP was to require that NAP, not Unitil, be responsible for encouraging as many suppliers as possible to use the exchange. Exh. AG 1-26. At the hearing, Mr. Brock confirmed that the reference to Usource was an error, and that the responsibility for providing active bidders on the exchange belonged to NAP. Tr. 6/11/03 at 90 (Brock).

Moreover, for the reasons explained in §II A.3, supra, the dealings between Usource and Enermetrix are not relevant to the question whether Enermetrix was an affiliate of FG&E under G.L. c. 164, §85.

C. The Benefits to FG&E's Customers from the Enermetrix Transactions Should Be Considered

The Attorney General's request that the Department disregard the significant benefits to FG&E's customers from the default service solicitations conducted by Enermetrix is unreasonable. AG Br. at 6. There is no evidence of the "lack of candor" alleged by the Attorney

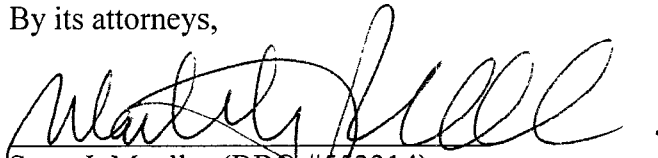
General. Id. As stated in FG&E's initial brief, FG&E correctly determined that Enermetrix was not an affiliate of FG&E under the provisions of c. 164, §85 and 220 C.M.R. 12.02. Even if the Department now interprets the applicable statutes and regulations differently and concludes that Enermetrix was an affiliate, there is no evidence that FG&E's statutory analysis was unreasonable or that its actions with respect to the 2001 and 2002 default solicitations were undertaken in bad faith. There is, therefore, no reason to assess against FG&E the harsh penalties recommended by the Attorney General, particularly in light of the evidence of the significant benefits to customers from the low default service rates that were achieved by the Enermetrix solicitations. FG&E's efforts to increase bidder participation in its default service solicitation were consistent with the Department's objectives of promoting efficient competitive markets. Moreover, a monetary penalty would be inconsistent with the Department's goal of encouraging efficient practices among utilities subject to its jurisdiction.

### III. CONCLUSION

Based upon the above-stated facts and analysis, and the facts and analysis in FG&E's initial brief, FG&E respectfully requests that the Department find Enermetrix was not an affiliate of FG&E in 2001 and 2002 under M.G.L. c. 164, §85 and 220 CMR §12.02.

Respectfully submitted,  
FITCHBURG GAS AND ELECTRIC  
LIGHT COMPANY

By its attorneys,

A handwritten signature in black ink, appearing to read "Scott J. Mueller", is written over a horizontal line.

Scott J. Mueller (BBO #553314)

Meabh Purcell (BBO #554020)

LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.

260 Franklin Street

Boston, MA 02110-3173

Tel (617) 439-9500

Fax (617) 439-0341

DATED: July 3, 2003